

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Moxley Homes, LLC

Serial Nos. 88882171 and 88882239

David Michael Conner of The Conner Law Group, P.C.
for Moxley Homes, LLC.

Christine Martin, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

Before Wellington, Heasley, and Lynch
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Moxley Homes, LLC (“Applicant”) seeks registration on the Principal Register of



the marks MOXLEY HOMES in standard characters¹ and ,² both with a disclaimer of HOMES, for:

Construction and renovation of buildings; Construction and repair of buildings; Construction management; Construction of buildings; Construction of residential, townhome, apartment, and condominium buildings; Construction planning; Construction services, namely, planning, laying out and construction of a planned residential community; Construction services, namely, planning, laying out and construction of residential and commercial communities; Construction supervision; Construction, maintenance and renovation of real property; Building construction; Building construction and repair; Building construction services; Building construction supervision; Building construction, remodeling and repair; Custom construction of homes; Real estate development and construction of commercial, residential and hotel property, in International Class 37.

The Examining Attorney has refused registration of both marks under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark

¹ Application Serial No. 88882171 was filed April 22, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on alleged use of the mark in commerce.

² Application Serial No. 88882239 was filed April 22, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on alleged use of the mark in commerce. The application does not claim color as a feature of the mark, and includes the following description: “The mark consists of a circle with a cursive script ‘M’ appearing in the negative space inside the circle. Below the circle appears the word ‘MOXLEY’ in all caps. Below the word ‘MOXLEY’ appears a dash then the word ‘HOMES’ in all caps followed by another dash.”

MOXLEY TEAM, registered on the Principal Register in standard characters, with a disclaimer of TEAM, for “real estate agency services” in International Class 36.³

The Examining Attorney also refused registration of Applicant’s standard-character mark as primarily merely a surname under Trademark Act Section 2(e)(4), 15 U.S.C. § 1052(e)(4).

After the Examining Attorney made the refusals final, Applicant requested reconsideration and appealed. The Examining Attorney denied the requests for reconsideration, and the appeals proceeded. During the briefing, the Board consolidated the cases.⁴ For the reasons set forth below, we affirm the refusals to register.

II. Likelihood of Confusion – Both Applications

Our determination under Section 2(d) involves an analysis of all the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir.

³ Registration No. 5626640 issued on December 11, 2018 with a claim of acquired distinctiveness and a disclaimer of TEAM.

⁴ 15 TTABVUE. Except where otherwise indicated, we refer to the record in Application Serial No. 88882171, in TTABVUE for the Board proceeding, and in TSDR for the prosecution history and evidence.

2020) (“Not all *DuPont* factors are relevant in each case . . .”). Two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Alleged Lack of Fame and Alleged Abandonment of the Prior Registered Mark

We first briefly address and reject Applicant’s argument challenging the “fame” of the cited mark. Applicant has criticized the Examining Attorney for not “conduct[ing] an analysis of all evidence relevant to” the strength of the cited mark, but Applicant points to no such evidence in the record.⁵ In an *ex parte* appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). Because of the nature of the evidence required to establish the fame of a registered mark, which generally resides with the mark owner, in such *ex parte* appeals, where the mark owner is not a party and cannot provide such evidence, the “fame of the mark” *DuPont* factor is normally treated as neutral. *See In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006); *see also In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009)

⁵ 12 TTABVUE 21-22 (Applicant’s Brief).

(noting that the absence of evidence as to the fame of the registered mark “is not particularly significant in the context of an ex parte proceeding”).

The cited TEAM MOXLEY mark is registered on the Principal Register with a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, and with a disclaimer of the word TEAM. Accordingly, the cited mark is considered distinctive and therefore entitled to the normal scope of protection accorded a distinctive mark.⁶ See *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007); see also 15 U.S.C. § 1057(b).

In support of its position on this and other *DuPont* factors, Applicant further alleges that the cited registered mark has been “abandoned.”⁷ According to Applicant, the supposed abandonment of the mark means that “there is no large quantity of sales of products or services bearing the mark or large amount of advertising expenditures relating to the mark,” such that the registered mark is weak.⁸

The argument is inappropriate and unconvincing, as such a “collateral attack on the validity of the registration” is impermissible. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Controlling precedent is abundantly clear that the registration of the cited mark “is prima facie evidence of the validity of the registration and the registrant’s exclusive right to use the mark in connection with the services specified,” and “it is not open to an applicant to prove abandonment

⁶ As discussed below, we find no commercial weakness of the cited mark MOXLEY TEAM.

⁷ 12 TTABVUE 22 (Applicant’s Brief).

⁸ 12 TTABVUE 22 (Applicant’s Brief).

of [a] registered mark’ in an ex parte registration proceeding; thus, the ‘appellant’s argument . . . that [a registrant] no longer uses the registered mark . . . must be disregarded.’” *Id.* (quoting *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970)).⁹

Applicant’s abandonment arguments therefore receive no further consideration under this or any other *DuPont* factor.

B. Similarity of the Marks

We turn to the comparison of the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. v.*

⁹ In a compelling illustration of the rationale for this policy, the factual underpinnings of Applicant’s abandonment assertion are faulty, regardless, as it relies on the corporate dissolution of an entity *other than* the owner of the prior registration, and on events that occurred *before* the filing of the April 17, 2018 application that matured into the cited registration owned by Tyler Moxley, an individual. See TSDR November 19, 2020 Response to Office Action at 17 (dissolution document of Moxley Real Estate Team, Inc. dated December 6, 2017).

Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).



We compare Applicant's marks MOXLEY HOMES and — HOMES — to the cited mark MOXLEY TEAM, and find the marks similar. As urged by Applicant, we compare the marks in their entirety. However, for rational reasons, we may give more or less weight to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

All three marks share the same dominant term, MOXLEY, and its placement at the beginning of the marks contributes to its dominance. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “[t]he identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.”). Except for the M in Applicant's stylized mark, the other wording in all three marks lacks distinctiveness and has been disclaimed, further cementing the dominance of MOXLEY in all three marks. *See Detroit Athletic Co.*, 128 USPQ2d at 1050. MOXLEY looks and sounds the same in all three marks, and they look and sound similar overall because of this common element.

While Applicant's stylized mark includes an encircled cursive M above MOXLEY, consumers would perceive this as a monogram associated with the MOXLEY name, set on a background carrier. So, the encircled M merely points to and emphasizes the MOXLEY portion of the mark. MOXLEY also is the largest element of that mark, and its visual focal point. The cited standard-character mark could appear in the same font as in Applicant's stylized mark, in which case Applicant's stylization would not serve as a point of distinction. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant "entitled to depictions of the standard character mark regardless of font style, size, or color"); *see also Viterra*, 101 USPQ2d at 1909.

The additional wording in the respective marks creates some difference in appearance and sound, but we find the marks overall more similar than dissimilar, particularly because we must consider the marks "in light of the fallibility of memory." *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)).

As to the marks' connotations and commercial impressions, we also find them to be similar. First, consumers would derive the same meaning and impression from the shared term MOXLEY (as discussed below, a surname) in Applicant's marks as they would in the cited mark, and as just discussed, the additional generic or descriptive wording in both marks is less significant in terms of meaning and impression. Applicant makes no argument that MOXLEY carries a different significance in its

marks than in the cited mark, and instead insists that the additional wording distinguishes the marks.

Second, the other, different elements of the mark are less significant. In Applicant's mark, the additional word HOMES describes the subject matter of its real estate development and construction-related services, and has been disclaimed. In the cited mark, the additional word, TEAM, is similarly generic for or descriptive of the real estate agency services that presumably are provided by a team of agents, and the word has been disclaimed.¹⁰ While the additional wording changes the meaning and impression of the marks to some degree, it does so only in that it conveys information about the services, and therefore does not help consumers distinguish source. *See Detroit Athletic Co.*, 128 USPQ2d at 1050. So, contrary to Applicant's contention, we do not ignore the disclaimed matter in the analysis, but we give it less weight. Overall, the impressions of the marks as a whole are similar.

Given the resemblance in sound, appearance, connotation and commercial impression when the marks are considered in their entireties, both of Applicant's marks are similar to the cited mark, and the first *DuPont* factor weighs in favor of likely confusion.

¹⁰ Applicant concedes that the word TEAM is descriptive and "relatively weak" in the cited mark. 12 TTABVUE 14 (Applicant's Brief). However, we do not agree with Applicant's conclusion that the weakness of this term somehow results in a narrower range of protection for the cited mark as a whole.

C. Relatedness of the Services

In analyzing the second *DuPont* factor, we look to the identifications in the applications and cited registration. *See Detroit Athletic Co.*, 128 USPQ2d at 1051; *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[L]ikelihood of confusion can be found ‘if the respective [services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any service encompassed by the identification in these single-class applications. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744.

The Examining Attorney introduced numerous screenshots from various third-party websites promoting real estate development and construction-related services like Applicant’s and real estate agency services like Registrant’s under the same mark. Examples in the record include:

The website of the Sokol Group Real Estate and Development LLC states, “We are your full-service Real Estate and Development Agency....”¹¹

Screenshots from the website of Landmark Realty & Development Co. advertise its real estate agents and staff

¹¹ TSDR December 10, 2020 Office Action at 94-95 (thesokolgroup.com).

who also do “residential and commercial project development,” as well as its real estate developments.¹²

The Strathmore Real Estate Group website touts among its services “Real Estate Development” and “Real Estate Management, Sales, and Leasing.”¹³

The Sky Five Properties website describes the company as a “commercial and residential real estate firm” and a “real estate brokerage firm,” while also promoting “Developer Services.”¹⁴

This evidence supports the relatedness of the services in the applications and services in the cited registration by showing that consumers are accustomed to encountering them offered under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

In addition, the Examining Attorney introduced dozens of use-based, third-party registrations showing that the same entity has registered a single mark identifying both real estate development and construction-related services identical to those in the subject applications and real estate agency services such as those in the cited

¹² TSDR December 10, 2020 Office Action at 98-102 (spearfishlandmark.com).

¹³ TSDR July 12, 2021 Denial of Reconsideration at 61 (strathmore realestategroup.com).

¹⁴ TSDR July 12, 2021 Denial of Reconsideration at 62 (skyfiveproperties.com).

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registration.¹⁵ Such registrations are relevant to show that the respective services are of a type that may emanate from a single source under one mark. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988).

Applicant argues under this factor that the cited registration pertains to real estate agency services while Applicant’s services involve construction. However, the issue here is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source or sponsorship of these services. *L’Oreal S.A.*, 102 USPQ2d at 1439; *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). Even when services are not the same, where the evidence shows that consumers are used to encountering them from the same provider, they can be sufficiently related to “give rise to the mistaken belief that [the services] emanate from the same source.” *See Coach Servs., Inc.*, 101 USPQ2d at 1722.

To the extent Applicant argues that the services are dissimilar based on their “geographic separation,” based on Applicant’s assertions as to the geographic extent of the actual use of the marks in the marketplace,¹⁶ the argument is unavailing because neither the cited registration nor the applications include geographic limitations. The cited registration entitles the owner to nationwide rights, regardless

¹⁵ TSDR July 20, 2020 Office Action at 5-48; December 10, 2020 Office Action at 3-93.

¹⁶ 12 TTABVUE 16 (Applicant’s Brief) (alleging that Registrant is “a local real estate agency in the state of California,” while Applicant “is a home builder in coastal Georgia”).

of the geographic extent of actual use of the cited marks. 15 U.S.C. § 1057(b); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983). Given that, and “[i]nasmuch as [A]pplicant is seeking a geographically unrestricted registration, the Board is constrained to evaluate similarities in terms of potentially nationwide markets....” *In re Integrity Mutual Ins. Co.*, 216 USPQ 895, 896 (TTAB 1982).

The second *DuPont* factor weighs in favor of likely confusion.

D. The Trade Channels and Classes of Consumers

Turning to the trade channels and classes of consumers, because the identifications in the applications and cited registration have no restrictions on channels of trade, we must presume that the services travel in all appropriate channels of trade for such services. *See Hewlett-Packard Co.*, 62 USPQ2d at 1005. The third-party website evidence discussed above shows that real estate development and construction-related services, like those recited in the applications move in some of the same channels of trade as real estate agency services, like those described in the cited registrations, and are offered to some of the same classes of consumers.

Applicant attempts to read geographic and trade channel limitations into the unrestricted identifications of services by resorting to extrinsic evidence, but we must rely on the identifications alone. *See Detroit Athletic Co.*, 128 USPQ2d at 1053 (noting the impermissibility of an applicant's attempt to restrict the breadth of the goods or trade channels described in the cited registration). We cannot consider alleged marketplace realities not reflected in the identifications. *See Cunningham v. Laser*

Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”).

Thus, the third *DuPont* factor weighs in favor of likely confusion.

E. Conditions under Which and Buyers to Whom Sales Are Made

The fourth *DuPont* factor involves “[t]he conditions under which and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant contends that because of the nature of the services at issue, they would be subject to a higher degree of care in purchasing. Applicant’s briefing points to no supporting evidence under this factor.¹⁷ See *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

“Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’” See *Stone Lion Capital Partners*, 110 USPQ2d at 1163. Applicant’s services include the repair of buildings, which we must construe to include all types of building repair, leaving open the possibility that customers could include individual homeowners or renters, ordinary members of the public in need of relatively modest home repairs. See *S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly

¹⁷ 12 TTABVUE 17-18; 17 TTABVUE 8-9.

described, they are deemed to encompass all the goods of the nature and type described therein). These same types of consumers could seek real estate agency services such as Registrant's. We find this factor neutral.

F. Alleged Absence of Actual Confusion

Under the seventh and eighth *DuPont* factors, the record lacks evidence regarding the absence of actual confusion, and regarding contextual evidence “such that we could make a finding as to the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 *25 (TTAB 2020). Although Applicant makes assertions in its Brief that no actual confusion has occurred during two years of alleged concurrent use of the marks, again, “[a]ttorney argument is no substitute for evidence.” *Zheng Cai v. Diamond Hong*, 127 USPQ2d at 1799. We also note that “in this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion.” *Guild Mortg.*, 2020 USPQ2d 10279 at *23. Finally, Applicant's own contentions about the disparate geographic areas of the actual services, a relevant consideration under *this DuPont* factor, suggest a lack of opportunity for actual confusion to have occurred. *See Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, *46-47 (TTAB 2021) (“differences in the parties' geographic trading areas ... does not establish that there has been a reasonable opportunity for confusion to have occurred”). We find these factors neutral.

G. Extent of Potential Confusion

Applicant also contends that the twelfth *DuPont* factor, the extent of potential confusion, merits consideration. Applicant essentially makes a conclusory argument that given the arguments and/or evidence under various other *DuPont* factors we have already addressed, any potential confusion is merely de minimis.¹⁸ For the reasons previously stated, Applicant's arguments either cannot be considered as a matter of law, or are unpersuasive. Applicant's contentions under this factor essentially amount to balancing of all the relevant *DuPont* factors, rather than a separate consideration. As our conclusion below reflects, we do not agree with Applicant that the extent of potential confusion is de minimis.

H. Conclusion as to Likelihood of Confusion

The overall similarity of the marks for related services that move in some of the same channels of trade to the same classes of customers renders confusion likely. We treat the remaining relevant *DuPont* factors as neutral. Balancing the relevant factors, we consider the marks in both applications likely to result in consumer confusion.

¹⁸ The only seemingly new assertion is that “[e]vidence of third-party use of similar marks on similar goods [sic] shows that customers are educated enough to distinguish between different marks on the basis of minute distinctions.” 12 TTABVUE 21 (Applicant's Brief). However, Applicant points to no supporting evidence for this assertion, so we do not credit it. The record includes one third-party webpage of an individual named “Kris Moxley,” identified as a real estate agent doing business under the name “Moxley Real Estate within,” TSDR November 19, 2020 Response to Office Action at 19-22, but we do not find this persuasive to show commercial weakness of the cited mark. We also note that the Examining Attorney introduced a TESS search result page reflecting that for services in International Classes 36 and 37, the cited registration and Applicant's applications were the only live applications and registrations that include the term MOXLEY. TSDR December 10, 2020 Office Action at 2.

III. Surname Refusal – Application Serial Number 88882171

The Examining Attorney also has refused registration of the mark in Application Serial Number 88882171 under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that it is primarily merely a surname.

Section 2(e)(4) of the Trademark Act provides that absent a showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), registration on the Principal Register must be refused if the proposed mark is “primarily merely a surname.” A term is primarily merely a surname if, when viewed in relation to the goods or services for which registration is sought, its primary significance as a whole to the purchasing public is that of a surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017); *see also In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277 (TTAB 2016).

Various inquiries may be considered in determining whether the purchasing public would perceive a proposed mark as primarily merely a surname, including the following that have been raised in this case:

- the extent to which MOXLEY is encountered as a surname;
- whether MOXLEY is the surname of anyone connected with the applicant;
- whether MOXLEY has a non-surname, “ordinary language” meaning; and
- whether MOXLEY has the structure and pronunciation of a surname.

See In re Etablissements Darty et Fils, 759 F.2d 15, 225 USPQ 652, 653-54 (Fed. Cir. 1985); *Eximius Coffee*, 120 USPQ2d at 1278 n.4 (reviewing factors from *Darty* and *In*

re Benthin Mgmt. GmbH, 37 USPQ2d 1332, 1333-34 (TTAB 1995) and noting there is no need to discuss other inquiries for which the record lacks relevant evidence); *In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1719, 1721 (TTAB 2016) (noting the consideration of an inquiry if there is relevant supporting evidence of record). We conduct our analysis from the perspective of the purchasing public because “it is that impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance.” *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm’r Pat. 1955)).

A. The Extent to Which MOXLEY Is Encountered as a Surname

The Examining Attorney submitted evidence to show consumer exposure to MOXLEY as a surname:

An excerpt from the LexisNexis surname database reflecting a total of 8,366 listings for people with the surname.¹⁹

A Wikipedia entry and numerous articles about “Jon Moxley,” the ring name of an American professional wrestler and actor who achieved renown for accomplishments such as several World Wrestling Entertainment (WWE) United States Championships, a WWE Championship, several WWE Intercontinental Championship, two WWE Raw Tag Team Championships, and status as a WWE Triple Crown Champion and Grand Slam Champion and winner of Pro Wrestling Illustrated’s award for “Most Popular Wrestler of the Year” in 2014 and

¹⁹ TSDR July 20, 2020 Office Action at 49-54.

2015 and Sports Illustrated's "Wrestler of the Year" in 2019.²⁰

A Wikipedia entry and media coverage, such as New York Times and People Magazine articles, surrounding the 1975 murder of Martha Moxley, which has been widely publicized and has been the subject of several books, in part because a member of the Kennedy family was tried for and convicted of the crime in 2002, and has been the subject of a lengthy appeals process including the ordering of a new trial in 2013, the reinstatement of the conviction in 2016, the reversal of the reinstatement in 2018, and the announcement by the state of Connecticut in 2020 that it would not pursue a retrial.²¹

An Ancestry.com entry for "Moxley."²²

An author website of Jennifer Moxley.²³

A Poetry Foundation webpage on the poet "Jennifer Moxley," noting that she teaches at the University of Maine, has authored "numerous collections of poetry," has won poetry awards and has had work in several anthologies.²⁴

A University of Nebraska faculty webpage for an Assistant Professor of Biochemistry named Michael Moxley, Ph.D. who has authored numerous publications in his field.²⁵

A webpage featuring Brianne Moxley, a member of the Queens College women's basketball team during the 2019-20 season.²⁶

²⁰ TSDR July 12, 2021 Denial of Reconsideration at 2, 26-42.-.

²¹ TSDR July 12, 2021 Denial of Reconsideration at 3-6.

²² TSDR July 12, 2021 Denial of Reconsideration at 7-11.

²³ TSDR July 12, 2021 Denial of Reconsideration at 12-15.

²⁴ TSDR July 12, 2021 Denial of Reconsideration at 16-18.

²⁵ TSDR July 12, 2021 Denial of Reconsideration at 19-21.

²⁶ TSDR July 12, 2021 Denial of Reconsideration at 22-24.

An article in the San Francisco Examiner about the name change of “Transgender activist Elle Moxley.”²⁷

An Ohio news article about a rape conviction of Joshua Moxley.²⁸

An article from the Jamaica Plains News about the graduation and academic plans of Gray Moxley.²⁹

Applicant contends that the Lexis results are “insufficient and duplicative” because “directory evidence alone is not determinative.”³⁰ As set forth above, the Lexis evidence is far from the only relevant evidence, and is part of a larger record on this issue, which we find persuasive. As for the allegedly duplicative nature of the Lexis evidence, Applicant does not point to examples, and we do not find entries in the sample provided that are, on their face, necessarily duplicative. The nature of the evidence in this case therefore is not analogous to that criticized in the *Adlon Brand* case relied on by Applicant. *See Adlon Brand*, 120 USPQ2d at 1719-1720.

While MOXLEY may not be an especially common surname, the record does not indicate that it is rarely encountered. Rather, the surname database statistics and examples of published authors and others with the name, as well as the renown of some persons bearing the surname, show that consumer exposure to the surname is not rare. *See Etablissements Darty et Fils*, 225 USPQ at 653 (“[E]vidence that others in a number of cities in this country bear the surname DARTY” shows that “as a surname, DARTY is not so unusual that such significance would not be recognized by

²⁷ TSDR July 12, 2021 Denial of Reconsideration at 57.

²⁸ TSDR July 12, 2021 Denial of Reconsideration at 44-45.

²⁹ TSDR July 12, 2021 Denial of Reconsideration at 53-54.

³⁰ 12 TTABVUE 24 (Applicant’s Brief).

a substantial number of persons.”); *In re Olin Corp.*, 124 USPQ2d 1327, 1331 (TTAB 2017) (surname significance found where LexisNexis public records search for Olin returned 7,552 results and census data that counted 4,163 people with the surname Olin). In particular, the evidence regarding the well-known wrestler Jon Moxley and the notoriety of the Martha Moxley murder case suggest widespread exposure to MOXLEY as a surname. *See In re Six Continents Ltd.*, 2022 USPQ2d 135, at *10 (TTAB 2022) (“information about Hayley Atwell, who has achieved considerable renown having appeared in the Marvel Comics Captain America and Avengers movie series, is further evidence of the public's exposure to the Atwell surname”); *Adlon Brand*, 120 USPQ2d at 1720 (through the media, the public has been exposed to the surname). We find that MOXLEY cannot be considered a rarely encountered surname.

B. MOXLEY Is the Surname of Applicant’s Owner and Manager

The Examining Attorney notes that in response to her inquiry, Applicant stated that “Zachary Wayne Moxley is the sole member, principal and manager of Moxley Homes, LLC,”³¹ thus confirming that someone connected with Applicant has the surname in question. Applicant’s website prominently displays his signature,³² and Applicant’s specimen of use includes the following:

³¹ TSDR November 19, 2020 Response to Office Action at 16.

³² TSDR November 19, 2020 Response to Office Action at 40.



Zac Moxley
President

Thus, we are unmoved by Applicant’s contention that “the Examiner has not provided any evidence that the Applicant promotes the connection between himself and the alleged surname for the connection to be relevant.”³³

C. MOXLEY Has No Non-surname, “Ordinary Language” Meaning

The Examining Attorney points out that MOXLEY has no other meaning, as evidenced by a Merriam-Webster Online Dictionary screenshot showing that “moxley” “isn’t in the dictionary”³⁴ and a screenshot from the site of the Columbia Gazetteer of the World, showing no entry for “moxley.”³⁵ *See Six Continents*, 2022 USPQ2d 135, at *10-11 (the lack of entries in the Merriam-Webster Online Dictionary and the Columbia Gazetteer of the World is probative that the term has no other

³³ 12 TTABVUE 24 (Applicant’s Brief).

³⁴ TSDR July 20, 2020 Office Action at 55.

³⁵ TSDR July 20, 2020 Office Action at 58.

meaning as a word). Applicant has not suggested any alternative significance of MOXLEY, and we find none.

D. Structure and Pronunciation of a Surname

The Examining Attorney points to an Ancestry.com page for “Moxley” that lists “Similar surnames: Morley, Oxley, Mosley, Boxley, Loxley, Marley, Bodley, Coley, Exley,” and argues that this shows that MOXLEY has the structure and pronunciation of a surname. This evidence suggests that surnames ending in “-ley” are fairly common, and in this way MOXLEY has the structure and pronunciation of a surname.

E. Consideration of the Combination of MOXLEY with HOMES and the Impact on the Primary Significance of the Mark

Applicant’s services include “custom construction of homes” and the construction and real estate development of various kinds of residences, or homes. In the context of such services, HOMES is highly descriptive or generic, and Applicant voluntarily disclaimed the term in its initial application that proceeded under Section 2(f). *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005) (“it has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term ... at the time of the disclaimer.”). *See also Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (disclaimer is an admission of descriptiveness at the time the disclaimer was made).

The disclaimer also constitutes a concession that MOXLEY HOMES is not a unitary mark. *Six Continents*, 2022 USPQ2d 135, at *18; *see* TRADEMARK MANUAL OF

EXAMINING PROCEDURE (TMEP) § 1213.05 (July 2021) (“If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic, or otherwise, is required”) (citing *Dena Corp.* 21 USPQ2d at 1052 (“If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic, or otherwise, is required.”); and *In re EBS Data Processing, Inc.*, 212 USPQ at 966 (“[I]f the elements are so merged together that they cannot be regarded as separable elements, the mark is a single unitary mark and not a composite mark and no disclaimer is necessary.”)). A unitary mark consists of elements that come together to form a distinct meaning, independent of the meaning of the constituent elements. *Dena Corp.*, 21 USPQ2d at 1052. We agree that Applicant’s mark is not unitary.

Other than arguing that the Examining Attorney improperly dissected the mark, Applicant neither argues, nor offers any supporting evidence, that adding the descriptive or generic word HOMES to MOXLEY changes the significance, or otherwise alters the primary significance of MOXLEY as a surname in the mark MOXLEY HOMES. See *In re Weiss Watch Co.*, 123 USPQ2d 1200 (TTAB 2017) (holding WEISS WATCH COMPANY for clocks, watches, and related goods primarily merely a surname); *Azeka Bldg. Corp., v. Azeka*, 122 USPQ2d 1477 (TTAB 2017) (holding AZEKA’S RIBS for barbecue sauce primarily merely a surname); *In re Integrated Embedded*, 120 USPQ2d at 1504 (holding BARR GROUP for training, engineering, and expert witness services in the field of computer hardware and software primarily merely a surname). We find no such transformation here.

Accordingly, we find that the additional, disclaimed term HOMES does not alter public perception of the mark MOXLEY HOMES as primarily merely a surname.

F. Conclusion as to Surname Refusal

We find that the record, taken as a whole, establishes that the purchasing public would view MOXLEY HOMES as primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act.

Decision: The refusals to register in both applications based on likelihood of confusion are affirmed. The refusal to register in Application Serial No. 88882171 based on the mark being primarily merely a surname is affirmed.